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10/528,006	01/05/2006	Pierre Messier	102785-337-NP2	9028
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GOODWIN PROCTER LLP			DIXON, ANNETTE FREDRICKA	
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Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Office Action Summary	Application No. 10/528,006	Applicant(s) MESSIER, PIERRE
	Examiner Annette F. Dixon	Art Unit 3771

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --
Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
 - If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
 - Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED. (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) Responsive to communication(s) filed on 24 November 2008.
 2a) This action is FINAL. 2b) This action is non-final.
 3) Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) Claim(s) 1-9, 11-16 and 18-29 is/are pending in the application.
 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
 5) Claim(s) _____ is/are allowed.
 6) Claim(s) 1-9, 11-16 and 18-29 is/are rejected.
 7) Claim(s) _____ is/are objected to.
 8) Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) The specification is objected to by the Examiner.
 10) The drawing(s) filed on 24 November 2008 is/are: a) accepted or b) objected to by the Examiner.
 Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
 Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
 11) The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
 a) All b) Some * c) None of:
 1. Certified copies of the priority documents have been received.
 2. Certified copies of the priority documents have been received in Application No. _____.
 3. Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- 1) Notice of References Cited (PTO-892)
 2) Notice of Draftsperson's Patent Drawing Review (PTO-948)
 3) Information Disclosure Statement(s) (PTO/SB/08)
 Paper No(s)/Mail Date _____
- 4) Interview Summary (PTO-413)
 Paper No(s)/Mail Date _____
 5) Notice of Informal Patent Application
 6) Other: _____

DETAILED ACTION

1. This Office Action is in response to the amendment filed on November 24, 2008. Examiner acknowledges claims 1-9, 11-16, and 18-29 are pending in this application, with claims 1 and 9 having been currently amended, with claims 28 and 29 having been newly added, and with claim 10 and 17 having been cancelled.

Claim Rejections - 35 USC § 102

2. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

3. Claims 1, 9, 28, and 29 are rejected under 35 U.S.C. 102(b) as being anticipated by Niemeyer (4,951,664).

As to Claims 1, 9, 28, and 29, Niemeyer discloses a combination comprising: a permeable facemask (10) having a periphery adapted to abut a user's face (Figures 1 and 2); a compressible gasket (30) formed of a permeable filtering material on said periphery of said facemask (Figures 1 and 2) adapted to sit between said periphery of said facemask and a face of the user thereby filling any space that may exist there between; said permeable facemask (10) having an area for filtering air which is interior to said periphery and not covered by said gasket (30). Regarding the limitation of providing an air path therethrough, gasket (30) allows air to be forced out of or absorbed

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into the gasket (30) during compression and expansion. (Column 5, Lines 1-6).

Further, regarding the additional material (32) covering the gasket (30), Niemeyer discloses the material is impermeable to particles as small as 5 microns. (Column 5, Lines 7-28). As such, it is understood that air may pass through this material as air has a smaller particle size than 5 microns.

Claim Rejections - 35 USC § 103

4. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

5. Claims 2-8, 11-16, 18-25 are rejected under 35 U.S.C. 103(a) as being unpatentable over Niemeyer (4,951,664) in view of Rezuke et al. (5,582,865).

As to Claims 2, 7, 8, and 15-16, Niemeyer discloses a permeable facemask, yet does not expressly disclose the incorporation of active agents within the compressible gasket. However, at the time the invention was made the use of active agents within the compressible gasket were known. Specifically, Rezuke teaches the compressible gasket may include active agents such as: ion exchange resins and further discloses the use of impregnated iodine for the purpose of improving the filtering efficiency. (Column 3, Lines 48-49, and Examples II, VIII, and IX). Therefore, it would have been obvious to one having ordinary skill in the art at the time the invention was made to

modify the device of Niemeyer to include an active agents such as: ion exchange resins, as taught by Rezuke to impart superior filtering qualities to the filtering mask.

As to Claims 3-6, and 11-14, Rezuke teaches the composite filter element (16) is made of a non-woven polyester batting. (Figures 1, 2, 2a, and 2b; and Column 2, Line 45 thru Column 3, Line 20).

As to Claims 18 and 19, Rezuke teaches the fiber matrix is utilized to entrap active agents. (Column 5, Lines 65-67).

As to Claim 20, Rezuke teaches the non-woven material is polypropylene (Column 2, Lines 66-67).

As to Claim 21, Rezuke teaches the use of active agents such as ammonia, which is a biocide. (Column 5, Line 51-52).

As to Claim 22, Rezuke teaches the use of active agents such as Bromine, a halogen (Column 5, Line 31-33), and activated carbon (Columns 4, 5, 6, and 7).

As to Claims 23 and 24, Rezuke teaches the use of metals for the active agent such as zinc chloride (Column 4, Lines 60-67).

As to Claim 25, Rezuke teaches the filter based material includes an electrical charge. (Column 3, Lines 48 and 49).

6. Claims 26 and 27 are rejected under 35 U.S.C. 103(a) as being unpatentable over Niemeyer (4,951,664) in view of Rezuke et al. (5,582,865) as applied to claim 25 above, and further in view of Dhanakoti (4,927,692).

As to Claims 26 and 27, the system of Niemeyer /Rezuke discloses a facemask, yet does not expressly disclose the layering of the electrostatic charge and about 25 kilivolts. However, at the time the invention was made the use of a layered electrostatic charge and about 25 kilivolts was known. Specifically, Dhanakoti teaches the use of a multi-layer design (Figure 3c) in the application of electrostatic charges (Column 2, Lines 5-10) to a facemask for the purpose of evenly distributing the electrostatic charge across the facemask thereby reducing charge densities. (Abstract). Therefore, it would have been obvious to one having ordinary skill in the art at the time the invention was made to modify the system of Niemeyer /Rezuke to include the multilayer electrostatic charge as taught by Dhanakoti, for the purpose of enhancing filtering effect of the facemask.

Response to Arguments

7. Applicant's arguments filed November 24, 2008 have been fully considered but they are not persuasive. Applicant assertions the prior art made of record does not disclose or teach a breathable filtering material. However, Examiner respectfully disagrees. Applicant has amended the claim limitations to include the language of a "breathable filtering material". Where applicant acts as his or her own lexicographer to specifically define a term of a claim contrary to its ordinary meaning, the written description must clearly redefine the claim term and set forth the uncommon definition so as to put one reasonably skilled in the art on notice that the applicant intended to so redefine that claim term. *Process Control Corp. v. HydReclaim Corp.*, 190 F.3d 1350,

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1357, 52 USPQ2d 1029, 1033 (Fed. Cir. 1999). Upon reviewing Applicant's written description the term "breathable" is used in the context of "minimizing the pressure differential" (Page 2, Lines 11-13), "forming a filtering closure" (Page 3, Lines 4-6), and "in order to not create a so-called airtight junction but instead creates a breathable closure that actually covers all the contours of the different geometrical surface to provided a permeable closure, having filtering properties" (Page 16, Lines 9-13). However, nowhere within Applicant's written description is the meaning as asserted by the Applicant wherein "a sufficient amount of air for breathing" is to be provided via the filtering material. Thus, Examiner is entitled to use the common denotation of the term "breathable" and further the term "breathable" within the context of fabrics wherein the term refers to the ability of a fabric or clothing to transmit air and/or moisture. As addressed, Niemeyer discloses the material is impermeable to particles as small as 5 microns. (Column 5, Lines 7-28). Thereby, enabling the passage of air though the filtering material. Regarding the amount of air provided to make the device pass a "sufficient amount of air for breathing", Applicant has no disclosure relating to the amount of air that is passed nor provided any structural difference between the claimed invention and the prior art. Applicant is reminded, although the claims are interpreted in light of the specification, limitations from the specification are not read into the claims. See *In re Van Geuns*, 988 F.2d 1181, 26 USPQ2d 1057 (Fed. Cir. 1993). And further reminded, a recitation of the intended use of the claimed invention must result in a structural difference between the claimed invention and the prior art in order to patentably distinguish the claimed invention from the prior art. If the prior art structure is

capable of performing the intended use, then it meets the claim. Thus, in light of the aforementioned reasoning the rejection of the claims has been maintained.

Conclusion

8. Applicant's amendment necessitated the new ground(s) of rejection presented in this Office action. Accordingly, **THIS ACTION IS MADE FINAL**. See MPEP § 706.07(a). Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Annette F. Dixon whose telephone number is (571) 272-3392. The examiner can normally be reached on Monday thru Thursday.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Justine Yu can be reached on (571) 272-4835. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

Annette F Dixon
Examiner
Art Unit 3771

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